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Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In the Supreme Court of the United States

PITT VESOM, M.D.,

Petitioner,

v.

ATCHISON HOSPITAL ASSOCIATION; RYAN THOMAS, M.D.; DOUGLAS GORACKE, M.D.; DONALD SWAYZE, D.O.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

On summary judgment in a race discrimination case, must a plaintiff produce evidence challenging the validity of all possible nondiscriminatory justifications for the defendant's actions suggested in the evidence, in addition to challenging the reason proffered by the defendant for its action?

PARTIES TO THE PROCEEDINGS

Petitioner, plaintiff and appellant below, is Pitt Vesom, M.D. Defendants and appellees below are Atchison Hospital Association, Ryan Thomas, M.D., Douglas Goracke, M.D. and Donald Swayze D.O.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App. 1a-35a) is unpublished, but unofficially reported at 2008 WL 2053069. The memorandum and order of the United States District Court for the District of Kansas (App. 36a-110a) is unpublished, but unofficially reported at 2006 WL 2714265.

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 2008. This Petition is timely filed in accordance with Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The Court of Appeals had jurisdiction of this matter under the provisions of F.R.A.P. 3(a).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1981

(a) Statement of equal rights

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

STATEMENT OF THE CASE

I. BACKGROUND FACTS AND ISSUES

Petitioner, Dr. Pitt Vesom ("Vesom"), is an American citizen born in Thailand. App. at 2a. Vesom is a Board Certified specialist in Internal Medicine and Cardiology. App. at 5a. For a substantial period of time between 1983 and 2003, Vesom maintained medical staff privileges at Atchison Hospital Association, in Atchison, Kansas. App. at 2a. From the inception of Vesom's appointment to the medical staff in 1983, Vesom was excluded from the staff members' social events and activities, and though he was highly qualified, the majority of the medical staff routinely refused to refer cardiac patients to his care. App. at

5a. His wife, also Asian, was a board certified pathologist, but she was unable to find employment with the Atchison Hospital. App. at 5a.

When the Hospital refused to renew his medical staff privileges in 2003, Vesom sued the Hospital and three of the individual members of the Medical Executive Committee, claiming his privileges were terminated because of his race, Asian, in violation of 42 U.S.C. §1981 and Title VI of the Civil Rights Act of 1964. App. at 2a and 10a. Under the Hospital bylaws, the Medical Executive Committee is the body which recommends acceptance or rejection of an application for medical staff privileges or an application for renewal, required every two years. App. at 3a.

The Hospital justified its denial of Vesom's medical staff privileges based on a finding of the Medical Executive Committee that Vesom was a "disruptive physician" within the meaning of the Hospital's bylaws. App. at 8a. One of the members of the Medical Executive Committee, Dr. Rider, tendered an affidavit used by Vesom in opposition to Defendants' Motion for Summary Judgment. Dr. Rider testified that the decision of the Medical Executive Committee was not based on a determination that Dr. Vesom had been disruptive; rather, a majority of the Members of the Medical Executive Committee decided not to renew Dr. Vesom's medical staff privileges before even considering the justification for that denial. App. at 16a. Dr. Rider testified that the reasons put forth for terminating Vesom's medical staff privileges were decided after the fact upon advice from the Hospital's legal counsel that their decision could be justified in terms of bylaw violations. App. at 16a.

Another physician and medical staff member, Dr. Ware, offered testimony by affidavit that when he was recruited to the Hospital staff in 2002, the chief executive officer of the Hospital counseled him "Watch out for [Vesom]. He'll stab you in the back." App. at 19a-20a. Dr. Ware also testified that one member of the Medical Executive Committee told Dr. Ware that he "hated" Vesom, and another member of the Medical Executive Committee made disparaging remarks about Dr. Vesom at a golf outing. App. at 20a.

II. DECISIONS BELOW

In analyzing the motion for summary judgment, the District Court assumed that plaintiff was able to satisfy the elements of his prima facie case under 42 USC §1981 and Title VI of the Civil Rights Act of 1964. App. at 81a. Accordingly, the District Court's analysis centered on the issue of pretext. The District Court found:

> Even though plaintiff provides evidence of an ad hoc fabrication of the reasons behind the denial of his re-appointment, the Court finds that he has failed to create a question of fact for the jury that *race* motivated the decision.

App. at 86a. On appeal, the Tenth Circuit Court of Appeals affirmed the District Court's holding:

> Dr. Vesom finds it "incredible" that the District Court found evidence of a post-hoc justification for the denial of his reappointment, yet failed to deny summary judgment. He argues this finding, alone, permits an inference that the

> stated reason for termination "is plainly false and pretextual and ample evidence of mendacity." (Citing record). His argument misapprehends his burden. Although Dr. Rider's testimony states the four other members of the MEC decided to recommend denial of Vesom's renewal application before they reviewed the bylaws, Dr. Vesom failed to present any evidence this decision was motivated by racial animus.

App. at 25a-26a. The Court of Appeals noted there was unquestionable evidence that Vesom was disliked, even hated, by other members of the medical staff and members of the MEC. App. at 26a. Citing ***Swackhammer v. Sprint/United Management Co.*, 493 F.3d 1160, 1168 (10th Cir. 2007)**, the Court of Appeals held that Vesom's proof that the Hospital's reason for terminating his medical staff privileges was false is insufficient to permit a jury to infer that the decision was motivated by considerations of race. The Court of Appeals imposed an additional burden on Vesom to prove that other, unspecified nondiscriminatory reasons suggested in the evidence must be disproven as well in order to create a genuine issue of fact for the jury. The Court said:

> When a plaintiff's evidence supports a non-discriminatory motive for the employer's action and the plaintiff presents no evidence to undermine that motive, summary judgment for the employer is appropriate. ***Swackhammer*, 493 F.3d at 1168.**

App. at 27a.

REASONS FOR GRANTING THIS PETITION

I. SUMMARY OF THE ARGUMENT

In the instant case, the Tenth Circuit Court of Appeals affirmed summary judgment for defendants, notwithstanding the acknowledged presentation of plaintiff's prima facie case and proof that the defendants' stated reason for terminating Vesom's medical staff privileges was a *post hoc* fabrication. The Court relied on an earlier case which held that, in order to avoid summary judgment, a person claiming discrimination must not only offer evidence rebutting defendant's stated reason for the decision, but must also rebut all other potential nondiscriminatory reasons suggested in the evidence.

This case demonstrates that the Tenth Circuit has rejected the long-standing order and allocation of proof adopted and followed by this Court since 1973. All decisions of this Court require the defendant to articulate a legitimate, non-discriminatory reason for its action once a plaintiff has established a prima facie case of discrimination. Once the defendant has met its burden of going forward with the evidence, the burden shifts to the plaintiff to show the stated reason is a pretext for discrimination. This Court has held consistently that evidence that the defendant's stated reason for its action is false creates a permissible inference of discrimination without direct evidence of discriminatory motive.

The Tenth Circuit in this case returned to the pretext plus formulation, ostensibly rejected by this Court in ***Reeves v. Sanderson Plumbing Inc.*, 530**

U.S. 133 (2000). The Court of Appeals held that a plaintiff must proffer direct proof of discriminatory animus if the plaintiff cannot or does not rebut all possible nondiscriminatory justifications which the evidence may support.

The instant case demonstrates that the Tenth Circuit has rejected this Court's plain direction that evidence creating a jury issue on the issue of pretext is sufficient to survive summary judgment. Moreover, the Court of Appeals ruling impermissibly imposes on plaintiffs a burden of rebutting the defendant's affirmative defense that it would have reached the same result notwithstanding consideration of the plaintiff's race.

II. EMERGENCE OF RULE THAT PLAINTIFF MUST OFFER EVIDENCE REBUTTING ALL NON-DISCRIMINATORY REASONS SUGGESTED IN THE EVIDENCE

In ***Swackhammer v. Sprint/United Management Co.*, 493 F.3d 1160, 1168-69 (10th Cir. 2007)**, the Tenth Circuit Court of Appeals announced it was returning to a "pretext plus" analysis of the sufficiency of the evidence presented by a plaintiff asserting discrimination in those instances where the plaintiff's evidence "supports" a nondiscriminatory motive for the employer's action and the plaintiff presents no evidence to undermine that motive. In essence, the Tenth Circuit requires a plaintiff in a discrimination action to not only establish that the employer's articulation of the nondiscriminatory reason for its action is a pretext, but also prove that

any other nondiscriminatory motive suggested by the evidence did not motivate the employer's decision.

In the case *sub judice*, the District Court found sufficient evidence presented by plaintiff in response to defendants' motion for summary judgment to create a genuine issue of material fact with respect to the truthfulness of the defendants' stated reason for their action. Indeed, the District Court concluded that Vesom had presented evidence of an ad hoc fabrication of the reasons behind the denial of his re-appointment; nevertheless, the Court granted the defendants' motion for summary judgment because Vesom failed to create a question of fact for the jury that *race* motivated the decision. App. at 86a.

The Court of Appeals affirmed, observing:

> When a plaintiff's evidence supports a non-discriminatory motive for the employer's action and the plaintiff presents no evidence to undermine that motive, summary judgment for the employer is appropriate. ***Swackhammer*, 493 F.3d at 1168.**

App. at 27a. Vesom presented the testimony of one of the five members of the Medical Executive Committee who participated in the decision-making process, who testified that the reason given by the Hospital for terminating Vesom's medical staff privileges was a fabrication and was advanced by the Medical Executive Committee after the fact as justification for its decision. Notwithstanding proof that the Hospital's stated reason for its action was false and mendacious, the Court found that summary judgment was

appropriate because there was no direct evidence the decision of the Medical Executive Committee was motivated by racial animus. App. at 25a-26a.

The Court of Appeals acknowledged that the evidence "unquestionably established [Vesom] was disliked, even hated, by other members of the medical staff and members of the MEC." App. at 27a. However, the Court suggested that that animus could have resulted from tensions between the in-house and independent physicians or reports by Vesom and others of substandard medical care at the Hospital as reasons for that hatred. See App. at 27a-28a. Because Vesom offered no proof that these other possible reasons did not motivate the Medical Executive Committee, the Court concluded that Vesom failed to meet his burden in opposing defendants' summary judgment motion.

III. THE COURT OF APPEALS HAS ERECTED AN IMPOSSIBLE EVIDENTIARY BARRIER FOR CLAIMANTS IN DISCRIMINATION CASES

From ***McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)** to ***Desert Place, Inc. v. Costa*, 539 U.S. 90, 99-100 (2003)**, this Court has recognized that a plaintiff's prima facie case of discrimination, combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination and to withstand a motion for summary judgment.

With unwavering clarity, this Court has held that, upon production of evidence sufficient to establish a prima facie case, the burden of going forward with the evidence shifts to the defendant, requiring an articulation of a legitimate, nondiscriminatory reason or reasons motivating the alleged discriminatory action. As this Court observed in ***Texas Department of Community Affairs v. Burdine*, 450 US 248, 255 (1981)**, defendant must clearly set forth the reasons for its actions which are legally sufficient to justify a judgment for the defendant. Moreover, the defendant's explanation of its legitimate reasons must be clear and reasonably specific, both to satisfy its burden of rebutting the inference of discrimination arising from the prima facie case and to afford plaintiff a full and fair opportunity to demonstrate pretext. **Id. at 258.**

Now, the Tenth Circuit has imposed an additional evidentiary burden on individuals claiming discrimination. No longer is proof that the defendant's chosen reason for its action is false and mendacious sufficient to overcome a motion for summary judgment or withstand a motion for judgment as a matter of law. The plaintiff in a discrimination case must also offer evidence discrediting or rebutting any possible nondiscriminatory reason for the defendant's action which is "suggested" in the evidence. The carefully crafted order and allocation of proof adopted by this Court over the last thirty-five years has been rejected in the Tenth Circuit, in favor of a rule requiring plaintiffs to anticipate and disapprove all possible nondiscriminatory justifications for the defendant's actions which may be "suggested" by the evidence to avoid summary judgment.

IV. THE TENTH CIRCUIT RULING REQUIRES PLAINTIFF TO REBUT AFFIRMATIVE DEFENSES TO AVOID SUMMARY JUDGMENT

This Court has recognized consistently that individuals claiming unlawful discriminatory action are not saddled with the burden of proving that discriminatory animus was the sole cause for a defendant's action. Indeed, other factors may contribute to a defendant's decision, but if racial animus is a determining or motivating factor in a defendant's decision, the employer's decision is unlawful.

In mixed-motive cases, where both legitimate and illegitimate reasons motivated the decision, this Court has recognized that a defendant could avoid a finding of liability by proving that it would have made the same decision even if it had not allowed discrimination to play a role. ***Price Waterhouse v. Hopkins*, 490 U.S. 228, 261 (1989)**. The Court was divided on the question of the showing necessary by plaintiff to shift the burden of proof to the defendant on this question. In ***Desert Place, Inc. v. Costa, supra***, this Court held that the burden of proof shifts to a defendant to prove it would have made the same decision without consideration of any discriminatory factor, where a plaintiff presents sufficient evidence, direct or circumstantial, to permit a jury to conclude, by a preponderance of the evidence, that race was a motivating factor for the defendant's decision. **539 U.S. at 101-02**.

The non-moving party responding to a motion for summary judgment has the burden of producing evidence establishing a genuine issue of material fact for trial on the issues upon which the non-moving party will bear the burden of proof at trial. ***Celotex Corp v. Catrett*, 477 U.S. 317, 322-23 (1986).** Placing a burden on the plaintiff to come forward with evidence rebutting all possible nondiscriminatory reasons for the defendant's action, requires the plaintiff to present evidence on issues for which plaintiff does not bear the burden of proof or the risk of non-persuasion. In effect, the decision in the instant case required Vesom to rebut the Hospital's affirmative defenses in order to survive summary judgment. Whether defendant asserts the affirmative defense at trial or provides adequate proof at trial to support the defense is a matter which must await the trial, and it is not a subject for disposition on summary judgment.

More importantly, this Court has ruled consistently that in deciding a summary judgment motion the court must draw all reasonable inferences in favor of the non-moving party, and it may not make credibility determinations or weigh the evidence, because credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. ***Reeves*, 530 U.S. at 150-51**. By holding that the plaintiff must rebut each plausible nondiscriminatory reason to survive summary judgment, the court is effectively weighing the importance of each alternative nondiscriminatory explanation and giving each such explanation dispositive weight. Under the Tenth Circuit's holding in this case, the failure of plaintiff to

rebut all possible nondiscriminatory reasons supported by the record is fatal to plaintiff's claim, regardless of the weight or importance of any such reason. It is for the jury to decide whether nondiscriminatory motives were implicated in the decision-making and, if so, to weigh the extent to which each such possible factor affected the outcome.

V. THE IMPORTANCE OF A DEFINITIVE EXERCISE OF THIS COURT'S SUPERINTENDING AUTHORITY.

Over the years, the lower courts have drifted away from the pronouncements of this Court and have imposed additional burdens on individuals seeking redress for the discriminatory actions affecting their jobs and lives. In ***Reeves***, unanimously and in unequivocal terms, this Court again affirmed the ***McDonnell Douglas*** rule, established in 1973, that proof of pretext is sufficient to permit an inference of discrimination and send a case to a jury. The only exception noted in ***Reeves*** is the circumstance where the record conclusively establishes that some nondiscriminatory reason actually motivated the defendant's decision. **510 U.S. at 148**. It is of vital concern to the Bench and Bar that the clarity of the rule again articulated in ***Reeves*** not be riddled with circuit specific exceptions and unwarranted additional barriers to a trial on the merits.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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